

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DARRELL E. BUCKNER
Claimant

VS.

U.S.D. 259

Respondent,
Self-Insured

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Docket No. 1,010,459

ORDER

Respondent requests review of the October 16, 2003 preliminary hearing Order entered by Administrative Law Judge (ALJ) John D. Clark.

ISSUES

The ALJ denied respondent's request to terminate the benefits previously awarded in a preliminary hearing Order dated September 16, 2003, as well as the subsequent undated Nunc Pro Tunc Order filed with the Division on October 1, 2003. The respondent requests review of the October 16, 2003 Order alleging the ALJ exceeded his jurisdiction and that the claimant failed to carry his burden of proving proper and timely notice as required by K.S.A. 44-520.

Claimant argues there is sufficient evidence to establish timely notice was given to respondent's managerial employee(s) as required by the Kansas Workers Compensation Act (Act). Claimant further maintains that the evidence justifies the ALJ's decision to deny respondent's request to terminate claimant's medical care. As such, the ALJ's denial of respondent's request to terminate benefits was proper and should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant was employed by respondent as a full-time night janitor. His job responsibilities involved cleaning and maintaining an entire school on a nightly basis. According to claimant, he began to experience sharp back pains during the summer of 2002. Claimant has testified he told Matt Holick, his supervisor and fellow custodian, at some unidentified time during the fall of 2002 about his back problems. However, claimant maintains Mr. Holick did nothing for him and just ignored these complaints. Claimant attributes this to a deterioration in the working relationship between himself and Mr. Holick. He also maintains that at least two women in the human resources department knew of his injury.

In the fall of 2002, claimant indeed spoke with Jennifer Coats, a clerk in respondent's human resources department. However, the focus of their conversations stemmed from claimant's inquiry about a transfer. Ms. Coats testified that claimant was complaining about "having problems" with Matt Holick and Bill Savage, the acting principal at the school. According to her, he specifically referenced a "stressful situation." Ms. Coats acknowledged that claimant was having some performance and attendance issues with Mr. Holick. Indeed, exhibits produced by respondent indicate claimant was counseled about leaving his post early and was even placed on probation at one point. Ms. Coats further testified that during the conversations she had with claimant, he never mentioned any work-related injury nor did he indicate he had an injury at all. Her first notice of his claim came after June 2003.

Another human resources employee, Josephine Hebert, testified on behalf of respondent and her recollection is much the same as Ms. Coats. She was aware that claimant wanted to be removed from the building because of stress problems he was having but that those difficulties stemmed from his interaction with his coworkers and not from any work-related injury.¹

Likewise, Janice Thomas, the employee health nurse, testified that she had no knowledge of any work-related injury. She was aware that claimant was missing work and was gone as of December 16, 2002. But according to her, those absences were for personal matters and were not work-related nor was she ever informed that he had sustained a work-related injury until May 2003.² In fact, she processed the paperwork that provided claimant with short-term disability payments which are only available to those who have been injured as a result of a non-work-related event.

Finally, both Matt Holick and Bill Savage deny claimant ever told either of them of a work-related injury at any time during the fall of 2002. Both men testified that claimant had been counseled about his absences and the fact that he had been caught leaving work

¹ Hebert Depo. at 5.

² Thomas Depo. at 4.

early and had been unavailable to those who were using the school building after hours. At no time during these meetings did he bring up the fact of an injury or request treatment.

On his own, claimant sought treatment from a doctor on December 16, 2002. He was treated conservatively and apparently did not return to work for any extended period of time. On January 7, 2003, claimant went to the doctor and was taken off work for "stress and back pain."³ While he provided off-work slips to respondent, none of them indicate that his physical problems bore any causal relationship to his work. Claimant was released for work on March 19, 2003, but did not return. Accordingly, he was terminated. It was not until sometime in April 2003 that respondent became aware claimant was asserting a work-related claim.

Since his termination, claimant has obtained employment elsewhere. Then, on July 15, 2003, a preliminary hearing was held. Claimant testified on his own behalf and respondent was able to offer the testimony of Bill Savage, the acting principal at the school where claimant worked. For whatever reason, the testimony of Matt Holick, Jennifer Coats, Josephine Hebert and Janice Thomas was not taken and was therefore not considered by the ALJ.

The Act requires an injured employee to provide "notice of the accident, stating the time and place and particulars thereof, . . . to the employer within 10 days after the date of the accident. . . ."⁴

Based upon the testimony of claimant and Bill Savage, the ALJ concluded claimant had provided the statutory notice required by the Act⁵ and that as a result, claimant was entitled to the benefits he requested. An Order was issued on September 16, 2003, granting claimant medical benefits and temporary total disability benefits. Following this Order, the ALJ entered a Nunc Pro Tunc Order in which the ALJ added that respondent was to furnish the names of three physicians from which claimant was to select one for treatment.

After the September 16, 2003 Order was entered, respondent completed the depositions of the individuals who are listed above and asked the ALJ to conduct another preliminary hearing and consider whether benefits should be terminated. After reviewing the additional evidence, the ALJ denied the request to terminate benefits.

After reviewing the record as a whole, and recognizing the important role the ALJ plays in these matters, the Board finds the ALJ erred in refusing to grant respondent's

³ Thomas Depo. at 8; *Id.*, Ex. 1.

⁴ K.S.A. 44-520.

⁵ *Id.*

request to terminate benefits. At the time of the initial preliminary hearing, the issue of notice turned upon the testimony of two people, that of claimant and Bill Savage, who testified by deposition just after the preliminary hearing. When faced with such a choice, it is not unreasonable to defer to the ALJ and his or her evaluation of the credibility of those testifying.

However, since the initial determination the respondent has offered a significant amount of additional testimony. When that evidence is considered as a whole, it would appear that the most logical conclusion in this matter was that claimant did not provide notice as he says. While he certainly had conversations with two women in the human resources department, the focus of those conversations was his desire for a transfer to a different school. Claimant made it clear in his own testimony that his working relationship with Matt Holick was deteriorating. Mr. Holick's testimony is uncontroverted that the deterioration was attributable to the claimant's work performance and attendance problems. This testimony is wholly consistent with claimant's desire for a transfer. He could easily have told one of the women in human resources of his alleged injury but he did not. The best he could offer in the way of notice to each of these women was that they "knew." This allegation is insufficient under these facts and circumstances.

The only person claimant says he told of his injury was Matt Holick. Mr. Holick denies there was any friction between the two of them other than the fact that claimant was leaving work early and that as claimant's supervisor, he was required to address the problem with claimant.

When all this evidence is considered, the Board is of the opinion that claimant failed to meet his burden of proof on the issue of notice. If there were some additional evidence to substantiate his claim that he verbally notified a managerial employee in respondent's employ about his alleged injury, the Board's conclusion might be different. Nevertheless, under these facts and circumstances the Board is persuaded that claimant failed to meet his evidentiary burden on the issue of notice. As such, the ALJ's denial of respondent's request to terminate benefits is reversed and the request is, hereby, granted.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge John D. Clark dated October 16, 2003, is reversed and the respondent's request to terminate benefits is granted.

IT IS SO ORDERED.

Dated this _____ day of December 2003.

BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant
Gary K. Albin, Attorney for Respondent
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director